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No. 05-1159

In The Supreme Court of the United States

MIKE HATCH, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MINNESOTA AND NOT AS AN INDIVIDUAL,

Petitioner,

v.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

MIKE HATCH
Attorney General
State of Minnesota

KRISTINE L. EIDEN
Chief Deputy Attorney General

JEANNE M. COCHRAN
Assistant Attorney General
445 Minnesota Street
Suite 1100
Saint Paul, MN 55101-2128

MARGARET CHUTICH
Counsel of Record
Assistant Attorney General
445 Minnesota Street
Suite 900
Saint Paul, MN 55101-2127
(651) 296-2418

JESSICA A. PALMER-DENIG
Assistant Attorney General
445 Minnesota Street
Suite 900
Saint Paul, MN 55101-2127

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUPPLEMENTAL BRIEF FOR PETITIONER

This brief responds to the Brief for the United States as Amicus Curiae submitted by the Solicitor General ("Solicitor's Br."). The Solicitor ignores Congress's clear intent to preserve the States' historic authority to adopt consumer protection measures like the Minnesota Wireless Consumer Protection Act, Art. 5, Minn. Stat. §325F.695 (2004) ("Article 5"), and fails to recognize that the court of appeals erred when it preempted Article 5. Minnesota along with thirty-six other States, on behalf of the more than 184 million wireless customers in this country, respectfully ask this Court to accept the petition.

I. Congress Preserved Broad State Authority Over Terms And Conditions Of Wireless Service.

As the Solicitor concedes, States have long had the authority to regulate telephone service, including wireless service, consistent with the dual federal-state regulatory scheme. Solicitor's Br. 2. Indeed, until 1993, States had full authority to regulate intrastate common carrier wireless service. H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

When Congress amended the wireless regulatory framework in 1993, it preserved traditional State authority to regulate all "terms and conditions of commercial mobile services" (a/k/a wireless service) other than "rates charged" and "entry." 47 U.S.C. §332(c)(3)(A). Congress intended this express preservation of state authority over "other terms and conditions" to be interpreted expansively.

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and *other consumer protection matters*; facilities siting issues (e.g., zoning); transfers of control;

> the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. *This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."*

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

The Solicitor ignores this clear statement of Congressional intent. Instead, the Solicitor mischaracterizes the States' current authority over wireless service, contending that "Congress eliminated dual federal and state regulation and established instead a uniform 'Federal regulatory framework to govern the offering of all' wireless telephone services." Solicitor's Br. 2 (citing legislative history of Section 332(c)(1), not 332(c)(3)(A), and a Federal Communications Commission ("FCC") order out-of-context).[1]

The plain language of Section 332(c)(3)(A) refutes this claim. Dual federal and state regulation still plainly exists; the States are preempted only from regulating "rates charged" and "entry," but are expressly authorized to regulate *all* "other terms and conditions." 47 U.S.C. §332(c)(3)(A); *see also*, H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588 (providing

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[1] The Solicitor focuses on the legislative history of 47 U.S.C. §332(c)(1), which sets forth the new federal, as opposed to state, regulatory framework for wireless services. Contrary to the assertion of the Solicitor, the history cited *does not* provide that all state regulatory authority over wireless service is eliminated. H.R. Conf. Rep. 103-213, at 490, *reprinted in* 1993 U.S.C.C.A.N. 1088, 1179. Similarly, the FCC order cited by the Solicitor refers to legislative history adopted in relation to the use of competitive bidding for radio frequency licenses. *See Connecticut Dep't of Pub. Util. Control*, 10 F.C.C.R. 7025, 7034 (¶14, n.44) (1995).

"states still would be able to regulate the terms and conditions of [wireless] services").

The Solicitor also erroneously claims that "Congress limited [wireless] regulation to situations 'for which the Commission and the states could demonstrate a clear-cut need.'" Solicitor's Br. 3. Notably, the Solicitor does not limit this claim to regulation of "rates charged," even though the FCC order it cites was issued in direct response to a request for continued state rate regulation. This is an unabashed and unsupportable narrowing of the actions of Congress. Section 332(c)(3)(A) does not require States to "demonstrate a clear-cut need" to regulate "other terms and conditions" of wireless service. Congress clearly and intentionally preserved the States' unfettered authority to regulate these areas.

II. The Assumption Against Preemption Applies To The Minnesota Law.

The Solicitor is also wrong when he argues that "the 'assumption of nonpreemption' has no application" in this case. Solicitor's Br. 13. The Solicitor inexplicably fails to apply the preemption standard set forth in this Court's recent opinion in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Instead, the Solicitor relies on two older, less relevant cases. Solicitor's Br. 13 (citing *United States v. Locke*, 529 U.S. 89, 108 (2000); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)).

In *Bates*, this Court reaffirmed that "[i]n areas of traditional state regulation, [the Court] assume[s] that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" 544 U.S. at 449 (citations omitted). States have traditionally had authority to regulate wireless telephone service. H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588. Therefore, as the court of appeals

correctly recognized, the assumption against preemption applies with full force to Article 5.

The older cases cited by the Solicitor do not even support the Solicitor's mistaken position. These cases recognize that *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) provides that the assumption against preemption applies where, as here, Congress has legislated "in a field which the States have traditionally occupied." *See Locke*, 529 U.S. at 108; *Buckman Co.*, 531 U.S. at 347. Further, unlike this case, both *Locke* and *Buckman Co.* address areas that historically have been of exclusive federal concern and involve questions of implied preemption. *See Locke*, 529 U.S. at 99, 111-12; *Buckman Co.*, 531 U.S. at 347-48.

III. The Court of Appeals Erred In Finding The Minnesota Law Is Preempted.

The Solicitor incorrectly asserts that the court of appeals properly concluded that Article 5 is preempted by Section 332(c)(3)(A). The Solicitor fails to show that Congress clearly and manifestly intended to preempt the law. *See Bates*, 544 U.S. at 449. The Solicitor also ignores that the court of appeals was required to adopt the clearly plausible interpretation of Section 332(c)(3)(A) advanced by Petitioner. *See id.*

Instead, the Solicitor erroneously argues that Article 5 "fixes," "freezes," or constitutes "state-oversight" of rates through a "state-imposed" maximum charge or "ceiling" and therefore "regulates" the "rates charged." *See* Solicitor's Br. 8-12. The Solicitor claims that rate regulation has commonly been understood to include "laws that 'fix the prices a utility could charge,'" and "to include both governmental rate prescriptions . . . and limitations on rate increases." Solicitor's Br. 8-9. The cases cited by the Solicitor, however, *actually support the Petitioner's view* that the notice and consent requirements in Article 5 do

not "regulate" the "rates charged," but instead regulate "other terms and conditions."

All of the cases cited by the Solicitor involve a government entity establishing a *specific dollar amount* that the utility had to charge or could not exceed. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 381-82 (1932) (a specific maximum rate of 71 cents established by the Interstate Commerce Commission); *Mobile Oil Exploration & Producing S.E., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 219 (1991) ($2.57 ceiling per million Btus established by the Federal Energy Regulatory Commission); *Permian Basin Area Rate Cases*, 390 U.S. 747, 763 (1968) (specific maximum area gas rates established by the Federal Power Commission); *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 477, 489 (2002) (rate schedules that a utility could charge enacted by a legislature and state agencies authorized to set specific rates).

In addition, in *Permian Basin* and *Mobile*, the limits on rate increases, cited by the Solicitor, were adopted pursuant to broad grants of regulatory authority. *See Permian Basin*, 390 U.S. at 754, n.1, 755; *Mobile*, 498 U.S. at 219, 222-223, 226-227. The agencies were not limited to regulating only "rates charged." *Id.* Further, in all four cases cited by the Solicitor, the rate regulation was premised on the common overriding statutory mandate that the utility only charge reasonable rates. *See Arizona Grocery Co.*, 284 U.S. at 384-386; *Mobile Oil*, 498 U.S. at 222-223; *Permian Basin*, 390 U.S. at 754, n.1, 756, n.8; *Verizon*, 535 U.S. at 477, 481-484, 489.[2]

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[2] Contrary to the Solicitor's assertion, Petitioner never stated that regulation of "rates charged" could *only* occur through state requirements for filing of tariffs. If a state legislature were to fix a specific maximum rate for wireless service, like $40 a month, the law would regulate rates charged. Article 5 does no such thing.

Conversely, Article 5 does not establish a *specific dollar amount* that the utility must charge or cannot exceed, and Article 5 does not require that rates be reasonable. Article 5 is indifferent as to the amount charged. The Minnesota law leaves it to the customer and the company to determine the specific amount charged, whether that be $40 per month or $400 a month. Therefore, the law does not "fix," "freeze," "oversee," or otherwise "regulate" the "rates charged" by wireless carriers.

Further, the FCC orders relied on by the court of appeals and the Solicitor do not mandate a different conclusion. None of these orders addresses whether a requirement for prior notice of and consent to wireless contract changes "regulates" the "rates charged" or "other terms and conditions." *See* Pet. App. 7a-9a (citing *Pet. on Behalf of the State of Hawaii, Pub. Util. Comm'n*, 10 F.C.C.R. 7872, 7882 (1995) ("*Hawaii Order*"); *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 19907 (1999); *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17022 (2000); *Pet. of Pittencrieff Commc'ns, Inc.*, 13 F.C.C.R. 1735, 1745 (1997)); Solicitor's Br. 9-11 (citing the same FCC orders).

In addition, the *Hawaii Order*, relied upon by the Solicitor for the proposition that a "state-imposed delay in the effective date of rate increases constitutes 'rate regulation,'" is inapplicable here. The *Hawaii Order* involved a 1994 request by the State of Hawaii pursuant to Section 332(c)(3)(B) to retain its preexisting rate regulation authority. The "state-imposed delay" in that case was the required filing of tariffs with the Hawaii commission for approval before a rate change. *See Hawaii Order*, 10 F.C.C.R. at 7882 (¶46). In addition, Hawaii law at the time required wireless rates to be reasonable. *See id.* at 7879 (¶¶30-31); *see also* Haw. Rev. Stat. Ann. §269-16 (1994). Article 5, on the other hand, *does not* involve filing of tariffs or review of rates by the State of Minnesota, and there is *no*

requirement that wireless rates charged in Minnesota be reasonable.

The Solicitor is improperly overreaching by attempting to expand the phrase "regulate . . . rates charged" beyond its normal meaning just as the FCC did in *National Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1258 (11th Cir. 2006) ("*NASUCA*"). The use of the word "any" in Section 332(c)(3)(A) does not expand the terms "rates charged" and "regulate" beyond their normal meanings as demonstrated by Congress's intent to preserve broad State authority over all "other terms and conditions." The Solicitor's argument, and the court of appeals' conclusion, that Article 5 "regulates" "rates charged" simply by requiring notice of and consent to contract changes renders the reservation of State authority over "other terms and conditions" virtually meaningless, a result contrary to law.

The Solicitor and court of appeals also erroneously conclude that Article 5 is preempted because it has a "'clear and direct effect on rates.'" *See* Solicitor's Br. 13. Section 332(c)(3)(A) does not preempt laws that "affect" rates; it only preempts laws that "*regulate* . . . the rates charged." 47 U.S.C. §332(c)(3)(A) (emphasis added); *see NASUCA*, 457 F.3d at 1255 ("That the . . . requirement . . . has some effect on the charge . . . does not necessarily place a regulation within the meaning of 'rates' and outside the ambit of state regulation of 'other terms and conditions.'") In any event, Article 5 does not have a "clear and direct effect on rates." Article 5 simply addresses the notice and consent required for substantive contract changes. The effect it has on rates, if any, would be *indirect*, resulting only if a provider wanted to increase existing contract rates without giving notice and without obtaining the customer's affirmative consent. Article 5, therefore, regulates the contract change process, not the

amount of "rates charged." *See* Pet. 24-28; Supplemental Br. for Pet'r 1-4.

Finally, the Solicitor's interpretation of Section 332(c)(3)(A), if followed, would have devastating consequences for consumers. Wireless providers could change rates without any prior notice to customers, leaving customers to find out about the change only *after* they receive a bill. There is absolutely no evidence that Congress intended to allow this type of unfair business practice or intended to deny States the authority to adopt basic measures to protect consumers from such a practice. In fact, Article 5 *furthers* Congress's goals by leaving the establishment of the "rate[] charged" to the company and the customer and by ensuring that the consumer is protected through a fair contract change process. *See* H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.[3]

IV. The States And Consumers Need Guidance From The Court On The Critical States' Rights Issues Presented.

The federal questions presented here are of great importance to all fifty States and the more than 184 million wireless consumers in this country. The Solicitor claims this case is of "limited importance" to Minnesota and of even less importance to other States. Solicitor's Br. 17. Yet, the Attorneys General of thirty-six States support the petition. *See* Amici Br. of Michigan, *et al.* These States recognize that this Court, not the court of appeals, should determine the scope of state authority under Section

[3] Contrary to the Solicitor's assertion, Article 5 does not interfere with the wireless companies' ability to respond quickly to competitors' price changes. Solicitor's Br. 11. In a competitive market, one would expect prices to go down, not up. Nothing in the Minnesota law precludes carriers from lowering their prices immediately.

332(c)(3)(A) to regulate unfair business practices of wireless providers.

The Solicitor does not dispute that the wireless industry is rife with customer complaints. *See* Pet. 2; Solicitor's Br. 1-19. As six national consumer groups explained, the States play a vital role in protecting the ever increasing number of wireless consumers and it is imperative that this Court uphold the sovereign authority of the States to protect citizens. *See* Amici Br. of AARP, *et al.*

The Solicitor contends that the States are not precluded from enacting laws of general applicability requiring notice and consent to wireless contract changes. *See* Solicitor's Br. 17. Yet, if the notice requirement in Article 5 "fixes rates," its inclusion in a law of general applicability would have the same effect. The Solicitor's position, therefore, is logically inconsistent.

The Solicitor also erroneously suggests that the decision below does not call into question the authority of the States to enact and enforce wireless-specific laws so long as those laws do not "fix[]" or have a "'clear and direct effect on [CMRS] rates.'" *See* Solicitor's Br. 18. If Article 5 has a "clear and direct effect on rates," it is not clear which wireless-specific laws would pass this test. The decision below leaves real confusion about the scope of States' rights to adopt wireless-specific laws.

Finally, the Solicitor cannot dispute that as a result of the recent *NASUCA* case,[4] the States face even more

[4] The Solicitor misstates the standard applied by the Eleventh Circuit Court of Appeals to determine whether regulations are preempted. Solicitor's Br. 16. The Eleventh Circuit did not hold that the test is whether a state requirement "affects" the amount charged but rather applied the ordinary definition of "rate" to determine whether a state requirement regulates rates charged. *See NASUCA*, 457 F.3d at 1254-1256, 1258. In fact, the Eleventh Circuit expressly recognized that

(Continued on following page)

uncertainty regarding the scope of their authority to regulate wireless service. This decision makes it more critical than ever that this Court determine the scope of the States' authority, as expressly preserved by Congress in Section 332(c)(3)(A), to protect wireless customers from unfair business practices.

CONCLUSION

Minnesota respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota

KRISTINE L. EIDEN
Chief Deputy Attorney General

MARGARET CHUTICH
Counsel of Record
Assistant Attorney General
445 Minnesota Street,
Suite 900
Saint Paul, MN 55101-2127
(651) 296-2418

JEANNE M. COCHRAN
Assistant Attorney General
445 Minnesota Street,
Suite 1100
Saint Paul, MN 55101-2128

JESSICA A. PALMER-DENIG
Assistant Attorney General
445 Minnesota Street,
Suite 900
Saint Paul, MN 55101-2127

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simply because a requirement "has some effect on the charge" does not mean it regulates "rates." *Id.* at 1255.